

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

05/29/2002

CLERK OF THE COURT  
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

CV 2001-013659

FILED: \_\_\_\_\_

DAVID BRAUDRICK

JAMES T VAN BERGEN

v.

STACY K STANTON, et al.

PETER C GULATTO

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may render judicial review of administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Petitioner to demonstrate that the hearing officer's decision was arbitrary, capricious, or involved an abuse of discretion.<sup>1</sup> The reviewing court may not substitute its own discretion for that exercised

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<sup>1</sup> *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

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by an administrative hearing officer,<sup>2</sup> but must only determine if there is any competent evidence to sustain the decision.<sup>3</sup>

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial Court, exhibits made of record and the Memoranda submitted.

Appellant, David Braudrick, was arrested on June 1, 2001, for driving under the influence, then transported to a DUI van for further investigation and DUI processing. After failing to produce a sufficient breath test, Appellant refused further breath testing. It is debatable as to whether Appellant requested a blood sample before or after a search warrant was secured. Note that the choice of which test to use to assess the blood alcohol level of a motorist is at the law enforcement officer's discretion.<sup>4</sup> The arresting officer accepted Appellant's refusal and served an Order of Suspension upon him.<sup>5</sup> On July 12, 2001, a hearing was held by the Motor Vehicle Division<sup>6</sup> to determine the validity of the twelve-month Implied Consent suspension served on Appellant<sup>7</sup>. The order of suspension was upheld by the administrative law judge, J.M. "Jack" McCormick.

There are factual inconsistencies concerning Appellant's refusal to take the first test; the arresting officer stated he thought Appellant *could* take the test, then he stated that he felt the Appellant *could not*, and that he was being cooperative. As a matter of law, if two inconsistencies can be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion.<sup>8</sup>

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<sup>2</sup> *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

<sup>3</sup> *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).

<sup>4</sup> A.R.S. §28-1321(a).

<sup>5</sup> Pursuant to A.R.S. §28-1321(d)(2)(b).

<sup>6</sup> Administrative law judge is given jurisdiction of this matter pursuant to A.R.S. §28-1321.

<sup>7</sup> As required by A.R.S. §28-1321(b).

<sup>8</sup> *Webster v. State Board of Regents*, 123 Ariz. 363, 365, 599 P.2d 816, 818 (App. 1979).

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Appellant clearly, unequivocally, and admittedly refused the second attempt of the breath test.

A licensed driver does not have an unfettered right to refuse to take a blood alcohol test or breath test upon request of a law enforcement officer. Although he may refuse the request, the refusal has consequences.<sup>9</sup>

Even if the preliminary breath test had been successful/admissible, a law enforcement officer can still require the motorist to submit to further tests to determine blood-alcohol concentration.<sup>10</sup>

After an arrest a violator shall be requested to submit to and successfully complete any test or tests...<sup>11</sup>

A failure to expressly agree to the test or successfully complete the test is deemed a refusal.<sup>12</sup> The motorist's refusal or failure to submit to the second test can support a license suspension under the implied consent law.<sup>13</sup>

Arizona's implied consent statute provides that any driver within this state is deemed to have given consent to a test to determine their BAC if arrested for DUI.<sup>14</sup> If a driver refuses, no test shall be given, but the driver's license will be suspended or denied for 12 months as a sanction for refusal.<sup>15</sup> The purpose of the implied consent law is to remove from Arizona's highways those drivers who may be a menace to themselves and others because of intoxication.<sup>16</sup> The sanction of

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<sup>9</sup> *State v. Brito*, 183 Ariz. 535, 538, 905 P.2d 544, 547 (App. 1995); A.R.S. §28-1321(b).

<sup>10</sup> *Valenzuela v. Cowan*, 179 Ariz. 286, 288, 877 P.2d 1342, 1344 (App. 1994).

<sup>11</sup> A.R.S. §28-1321(b).

<sup>12</sup> *Id.*

<sup>13</sup> A.R.S. §28-1321(d)(2)(b), *Caretto v. Ariz. Dept. of Transp.*, 192 Ariz. 297, 965 P.2d 31 (App. 1998).

<sup>14</sup> A.R.S. §28-1321(a).

<sup>15</sup> A.R.S. §28-1321(b).

<sup>16</sup> *Traylor v. Thorneycroft*, 134 Ariz. 482, 483, 657 P.2d 895, 896 (App.1982).

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administrative license suspension for refusal to submit to the test was enacted to assure that licenses of dangerous drivers are revoked quickly, and to increase the certainty that a drunk driver receives a penalty even if that driver provided no evidence of intoxication.<sup>17</sup>

The case at review is not analogous to the facts in Sherrill v. Ariz. Dept. of Transp.,<sup>18</sup> as claimed by Appellant. In Sherrill, the DUI arrestee agreed to submit to a second breath test, but blew another deficient sample. In the case at review, Appellant blew once, then clearly refused further breath testing. This refusal led to a valid suspension. I find that the administrative law judge, the Honorable J.M. McCormick, did not abuse his discretion, rule arbitrarily, or render a decision lacking sufficient evidence to support his finding. On appeal to this court, my duty is simply to "search the record to determine whether the evidence is of a substantial nature to support the lower court's decision."<sup>19</sup> I find the requisite evidentiary support within the record in this case.

IT IS THEREFORE ORDERED affirming the administrative decision.

IT IS FURTHER ORDERED remanding this case for all further and future proceedings in this case back to the Respondent Administrative Agency (DMV).

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<sup>17</sup> See Minutes of the Committee on Judiciary, Arizona Senate, April 7, 1987, H.B. 2273, at 14, as cited by Sherrill v. Ariz. Dept of Transp., 165 Ariz. 495, 497, 799 P.2d 836, 838 (1990).

<sup>18</sup> 165 Ariz. 495, 799 P.2d 836 (1990).

<sup>19</sup> Schade v. Arizona State Retirement System, 109 Ariz. at 398, 510 P.2d at 44.